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C O N F I D E N T I A L SECTION 01 OF 02 THE HAGUE 002869

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ROSTOW/WILLSON

E.O. 12958: DECL: FIVE YEARS AFTER ICTY CLOSURE

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: [ICTY](#) - APPEALS CHAMBER RETURNS LEAD IN DEFENSE
CASE TO MILOSEVIC

REF: A. THE HAGUE 2792

[1](#)B. THE HAGUE 2736

Classified By: Clifton M. Johnson, Legal Counselor, Reason 1.5(b)-(d).

[1](#)1. (SBU) Summary: On November 1, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) upheld the Milosevic trial chamber,s decision to impose counsel on the accused but reversed the trial chamber,s decision to give assigned counsel a lead role in the case. Finding that the trial chamber erred in both the law and the facts, the appeals chamber ordered a return to Milosevic of the "lead in presenting his case." The ruling will place counsel in the stand-by mode it should have been in to begin with, and is all but certain to lead to Milsevic,s reengagement with the case. While this will enhance the legitimacy of the trial, it will also confront States once again with Milosevic,s politicized defense and requests that former senior officials testify in the trial. End summary.

[1](#)2. (SBU) In a widely-anticipated opinion issued on November 1, the Appeals Chamber, presided over by ICTY president Theodor Meron, acknowledged the trial chamber,s difficulty conducting the trial while Milosevic,s health deteriorated. Describing at length the trial chamber,s many health-related obstacles in hearing the case, including thirteen suspensions for a total of 66 days and doctors, prognoses that there was a "real risk that a life-threatening hypertensive emergency would develop if (Milosevic) continued to represent himself," the Appeals Chamber concluded that "although the question is close" the trial chamber did not abuse its discretion in assigning counsel over the objections of the accused.

[1](#)3. (SBU) The Appeals Chamber "part(ed) ways" with the trial chamber, however, in its interpretation of the appropriate relationship between Milosevic and his assigned counsel. Since imposing counsel intrudes on Milosevic,s right to represent himself, the opinion states, the intrusion should be "limited to the minimum extent necessary to protect the Tribunal,s interest in assuring a reasonably expeditious trial." The chamber went on to instruct the trial chamber to devise a scheme that "minimizes the practical impact of the formal assignment of counsel," so that Milosevic will again take on the primary role in his defense, as he did before counsel, Steven Kay and Gillian Higgins, were assigned. The opinion notes that, "(I)n practice, if all goes well, the trial should continue much as it did when Milosevic was healthy. To a lay observer, who will see Milosevic playing the principal courtroom role at the hearings, the difference may well be imperceptible." It continued, "If Milosevic,s health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will enable the trial to continue even if Milosevic is temporarily unable to participate. The precise point at which that reshuffling of trial roles should occur will be up to the Trial Chamber."

[1](#)4. (C) Participants in the trial have reacted variously to this balanced decision, all with a tinge of criticism. Lead prosecutor Geoffrey Nice is, predictably, upset that the Appeals Chamber rejected the hard line position (i.e., that keeping defense counsel in the lead is essential and that only Milosevic is to blame for the problems in the trial) adopted by the trial chamber at his urging. Steven Kay told emboff that he found the decision "weak-kneed," and in the same breath suggested that his "ethical" obligations require him to continue to seek withdrawal from the case. See reftels. His "position has not changed" on withdrawal Kay says, although he retains "a duty" to continue functioning as defense counsel. Kay further suggested that he will reevaluate his position following the resumption of the case on Tuesday, November 9, when the trial chamber,s implementation of the appeals ruling will be clearer. (NB: The trial chamber, according to one Registry source, has ordered the parties to be prepared to discuss the withdrawal issue on November 9, after which it is expected to issue an order dealing with that and any other issues necessary to getting the trial back on track.)

15. (C) Embassy legal officers have learned that, as expected, Milosevic is happy with the ruling and expects to begin retaking the lead of his case next week (though he could use more time to prepare, it is said). However, a Registry source says that the "bridge" between Milosevic and Kay "has been burned" and "will take some time" to repair. For instance, a group associated with Milosevic has filed a complaint against Kay before the Dutch bar, apparently arguing that his disclosure of medical records violated the confidentiality of those records. (Separately, the group has

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filed a complaint against the Dutch physician, Dr. van Dijkman, on similar grounds.) The import of the claim against Kay is unclear, including whether it is something that Milosevic can and will withdraw if relations with Kay improve. In any event, Emboffs understand that the Registry is striving to avoid the loss of Kay and Higgins, who know the case well and, in its view, are best prepared to participate as stand-by counsel.

16. (C) Comment: The decision of the Appeals Chamber reorients the defense case back to where it should have been at the time counsel was imposed, with Milosevic in the lead but supported by a stand-by counsel in (the likely) case that his health again affects his ability to participate in the proceedings. Whether this decision will get the case back on track depends on two key wildcards: whether Milosevic takes the bait and returns to active participation in the trial and whether the defense counsel continue to pursue their request to be removed from the case. If Milosevic reengages fully, including with counsel, Kay and Higgins, reasons for seeking dismissal will be measurably diminished, and they would be likely to remain on the case. That in turn will help ensure a credible and visible defense, albeit one that will extend the trial well into 2006 and present states with the politicized defense and senior official witness demands that are at the heart of Milosevic's approach. End comment.

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